

Magistrate Judge Brian A. Tsuchida

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN THE MATTER OF  
THE EXTRADITION OF  
JASON STEADMAN

MJ15-562

MEMORANDUM OF LAW  
REGARDING EXTRADITION

On December 8, 2015, the United States filed its initial Complaint for the extradition of Jason Steadman (Steadman), formerly known as Stephen/Rory Preston, at the request of the Government of Canada pursuant to the Extradition Treaty between the United States and the Government of Canada. The relevant and applicable treaty provisions in full force and effect between the United States and Canada are found in the Extradition Treaty between the United States of America and Canada of December 3, 1971, which entered into force on March 22, 1976 (the 1971 treaty), (TIAS 8237; 27 U.S.T. 983); the Protocol Amending the Extradition Treaty with Canada of January 11, 1988, which entered into force on November 26, 1991 (the 1988 Protocol)(S. TREATY DOC. NO. 101-17 (1990)); and the Second Protocol Amending the Extradition Treaty with Canada of January 12, 2001, which entered into force on April 30, 2003 (the 2001 Protocol) (S. TREATY

1 DOC. NO. 107-11 (2002)). In this matter, the United States acts on behalf of the Canadian  
 2 government in accordance with United States' treaty obligations.

3 Canada has submitted a formal request for Jason Steadman's arrest, extradition and  
 4 surrender, supported by the appropriate documents, to the United States Department of State. The  
 5 originals of the documents are filed in hard copy with the Clerk of the Court, however copies of each  
 6 are filed with this pleading for the Court's convenience. By statute, this Court must hold a hearing  
 7 to consider the evidence of criminality presented by Canada and to determine whether it is  
 8 "sufficient to sustain the charge under the provisions of the proper treaty or convention." Title 18,  
 9 United States Code § 3184. If the Court finds the evidence sufficient, it must certify the same to the  
 10 Secretary of State, who decides whether to surrender the fugitive "according to the treaty." *Id.*<sup>1</sup>

### 13 INTRODUCTION

14 As set forth in the Complaint for Provisional Arrest Warrant and the much more extensively  
 15 in the Request for Extradition, Steadman is wanted by Canada for trial on charges of (1) First Degree  
 16 Murder, in violation of § 235(1) of the Criminal Code of Canada, and (2) Arson, in violation of  
 17 § 434 of the Criminal Code of Canada. These offenses correspond to crimes listed in the Federal  
 18 Criminal Code, that is, Murder, in violation of Title 18 United States Code, § 1111, and Arson, in  
 19 violation of Title 18, United States Code, § 81. As set forth more fully in the Complaint for a  
 20 Provisional Arrest Warrant, filed on December 8, 2015 and incorporated by this reference, Steadman  
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25 <sup>1</sup> After the Court has completed its "limited inquiry, the Secretary of State conducts an independent  
 26 review of the case to determine whether to issue a warrant of surrender." *Martin v. Warden, Atlanta*  
 27 *Penitentiary*, 993 F.2d 824, 829 (11th Cir. 1993). "The Secretary exercises broad discretion and  
 28 may properly consider myriad factors affecting both the individual defendant as well as foreign  
 relations, which the extradition magistrate may not." *Id.*

## FACTUAL SUMMARY

Mr. Demkiw's badly damaged mobile telephone was found on June 7, 2015, next to a concrete barrier on high bridge over a ravine. The bridge is part of a highway system between Mr. Demkiw's last known location in Edmonton and the Queen Elizabeth Highway, the main freeway between Edmonton and Calgary. Calgary is approximately 185 miles south of Edmonton.

Mr. Demkiw's burning car was found in Calgary within a few hours of his disappearance on May 31, 2015, and a man, matching Steadman's description, was photographed leaving the scene. A

1 passerby filmed the burning car and the man because the situation appeared so suspicious. The man  
2 threw away what appeared to be a license plate; Mr. Demkiw's car was found without its license  
3 plate. DNA analysis of blood stains isolated in the burning car revealed them to be of Mr. Demkiw's  
4 blood. Pictures of the man who left the burning car and walked into a nearby transit center have  
5 been identified as pictures of Steadman.  
6

7       Apparently viewed as a romantic rival by Steadman, Mr. Demkiw's remains were not  
8 discovered until April 2016, when they were discovered in a wooded area nearly 115 miles south of  
9 Edmonton and off of the Queen Elizabeth Highway between Edmonton and Calgary. An  
10 examination of the remains reveals clear evidence of linear trauma to the skull and vertebrae.  
11

12       Steadman's assumption of a false identity while in Canada initially complicated his  
13 identification. As more fully explained in other documents, several years before, on September 12,  
14 2012, Steadman presented two pieces of non-picture identification in the name of Canadian Robert  
15 Aubrey-Maxwell to the Insurance Corporation of British Columbia (ICBC). Claiming to be Aubrey-  
16 Maxwell, Steadman received a new identification card in that name but with Steadman's  
17 photograph. Within six months, Steadman had leveraged the ICBC card into an Alberta driver's  
18 license and Canadian passport in the name of Aubrey-Maxwell. Both bore Steadman's photograph  
19 and physical information. The real Aubrey-Maxwell has not been seen or heard from since  
20 September 6, 2012, when he telephoned his grandmother from Vancouver, B.C. That was only six  
21 days before Steadman's assumption of his identity and during a period of Steadman's residency in  
22 the Vancouver area. Witnesses in Edmonton have confirmed that pictures of Steadman are pictures  
23 of the man they knew well as Aubrey-Maxwell.  
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27       Because an extradition hearing is not a criminal or civil proceeding, but is *sui generis*, the  
28 government offers this memorandum setting out the legal principles that govern the hearing to be

1 held pursuant to Title 18, United States Code § 3184. While extradition law is an area of law unto  
 2 itself, nevertheless, the Supreme Court has expounded on many of the questions over the years and  
 3 has settled a number of those principles.

## 4 **LEGAL ISSUES**

### 5 **1. The Role of the Extradition Judge is Limited**

6  
 7 Extradition is primarily an executive responsibility with a specially defined role for a judicial  
 8 officer, who is authorized by statute to determine whether to certify to the Secretary of State that the  
 9 submitted evidence is “sufficient to sustain the charge.” Title 18, United States Code § 3184. The  
 10 Secretary of State, and not the court, makes the decision regarding whether the fugitive should be  
 11 surrendered to the requesting country. Title 18, United States Code §§ 3184, 3186; *Martin v.*  
 12 *Warden, Atlanta Penitentiary*, 993 F.2d 824, 828 (11th Cir. 1993). The Executive Branch remains  
 13 primarily responsible for extradition, while the extradition judge is assigned the limited duty of  
 14 determining the sufficiency of the request under the applicable treaty provisions. *Martin*, 993 F.2d  
 15 at 828-829. That judicial function is carried out by conducting the hearing pursuant to Title 18,  
 16 United States Code, Section 3184.

17  
 18 At the hearing, this Court should consider the evidence presented on behalf of the requesting  
 19 country and determine whether the legal requirements for certification, as defined in the treaty,  
 20 statutes and case law, have been established. If any explanatory evidence is offered by the fugitive,  
 21 the court rules on its admissibility in this hearing. Once the evidentiary record is complete, the court  
 22 should make written findings of fact and conclusions of law as to each of the elements for  
 23 certification, including separate findings for each offense as to which extradition is sought. *Shapiro*  
 24 *v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973). If the court certifies the evidence to the Secretary of  
 25 State, the court must commit the fugitive to the custody of the United States Marshal to await the  
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1 further determination by the Secretary regarding surrender to the representatives of the requesting  
 2 state. The court provides its certification to the Secretary of State together with a copy of the  
 3 evidence and a transcript of any testimony presented at the hearing. Title 18 United States Code  
 4 § 3184; *see Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000). The decision of whether to  
 5 surrender the fugitive to the requesting country rests with the Executive Branch, specifically with the  
 6 Secretary of State.

8 In fulfilling its function under Section 3184, this Court should liberally construe the  
 9 applicable extradition treaty in order to effectuate its purpose, namely, the surrender of fugitives to  
 10 the requesting country. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 14 (1936); *Factor*  
 11 *v. Laubenheimer*, 290 U.S. 276, 301 (1933). *United States ex rel. Sakaguichi Kaulukukui*, 520 F.2d  
 12 726, 731 (9<sup>th</sup> Cir. 1975). In discussing the application of this rule, the District Court for the  
 13 Southern District of Florida in *McElvy v. Civiletti*, 523 F. Supp. 42, 47 (S.D. Fla. 1981), wrote:

16 A narrow and restricted construction is to be avoided as not consonant with the  
 17 principles deemed controlling in the interpretation of international agreements.  
 18 Considerations which should govern the diplomatic relations between nations, and  
 19 the good faith of treaties, as well, require that their obligations should be liberally  
 20 construed so as to effect the apparent intentions of the parties to secure equality and  
 21 reciprocity between them.  
 22 *Id.* (quoting *Factor*, 290 U.S. at 287).

23 In order to carry out a treaty obligation, the treaty "should be construed more liberally than a  
 24 criminal statute or the technical requirements of criminal procedure," *Factor*, 290 U.S. at 298. This  
 25 country does not expect foreign governments to be versed in our criminal laws and procedures. *Grin*  
 26 *v. Shine*, 187 U.S. 181, 184 (1902). Thus, "[f]orm is not to be insisted upon beyond the requirements  
 27 of safety and justice." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925), *cited in Yapp v. Reno*, 26  
 28 F.3d 1562, 1565 (11th Cir. 1994).

Statements by the United States Department of State as to interpretation of treaties should be given great weight by the court. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 168 (1999); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”).

## 2. The Requirements for Certification are Well-Settled

An extradition certification is in order where: (1) the judicial officer is authorized to conduct the extradition proceeding; (2) the court has jurisdiction over the fugitive; (3) the applicable treaty is in full force and effect; (4) the crimes for which surrender is requested are covered by the applicable treaty; and (5) there is sufficient evidence to support a finding of probable cause as to each charge for which extradition is sought. *Fernandez*, 268 U.S. at 312; *Prasoprat v. Benov*, 421 F.3d 1009, 1013 (9th Cir. 2005); *Mainero v. Gregg*, 164 F.3d 1199, 1205 (9th Cir. 1999).

### A. Authority of the Court Over the Proceedings

The extradition statute authorizes proceedings to be conducted by “any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State.” Consequently, both magistrate judges and district judges may render a “certification” under Section 3184. *See Austin v. Healey*, 5 F.3d 598, 601-602 (2d Cir. 1993) (magistrate had authorization to conduct the extradition hearing without specific delegation of authority); *Ward v. Rutherford*, 921 F.2d 286, 287 (D.C. Cir. 1990) (both statute and local rule made plain magistrate’s authority to conduct extradition hearing); *Jimenez v. Aristeguieta*, 311 F.2d 547, 553-555 (5th Cir. 1962) (any judicial officer in class authorized by statute may conduct extradition hearing).

### B. Jurisdiction Over the Fugitive

1 It is also well settled that the court has jurisdiction over a fugitive found within its  
 2 jurisdictional boundaries. Title 18, United States Code § 3184 (court “may, upon complaint made  
 3 under oath, charging any person found within his jurisdiction, . . . issue [its] warrant for the  
 4 apprehension of the person so charged”). *Pettit v. Walshe*, 194 U.S. 205, 219 (1904); *Grin v. Shine*,  
 5 187 U.S. 181 (1902); *In re Coe*, 261 F. Supp. 2d, 1203, 1213 (C.D. Cal. 2003).

### 7 *C. Treaty in Full Force and Effect*

8 The extradition statute, Title 18, United States Code, § 3184, provides for extradition in  
 9 instances in which a treaty or convention is in force between the requesting state and the United  
 10 States. *See, e.g., In re Chan Kam-Shu*, 477 F.2d 333 (5th Cir. 1973); *Then v. Melendez*, 92 F.3d 851,  
 11 854 (9th Cir. 1996). In this case, the government expects to provide a declaration from an attorney  
 12 in the Office of Legal Adviser for the Department of State, attesting that there is a treaty in full force  
 13 and effect between the United States and the Canada. The Department of State’s determination is  
 14 entitled to deference from the court. *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Then*, 92 F.3d at  
 15 854 (since continuing validity of a treaty presents a political question, the judicial must defer to the  
 16 intentions of the Executive); *see also In re Extradition of Tuttle*, 966 F.2d 1316, 1317 (9th Cir.  
 17 1992).

### 21 *D. Crimes Covered by the Treaty*

22 Extradition treaties create an obligation for the United States to surrender fugitives under the  
 23 circumstances defined in the treaty. Article 2 of the Treaty, as replaced by Article I of the 1988  
 24 Protocol, provides for the return of fugitives charged with or convicted of an “extraditable offense”  
 25 as that term is defined under the treaty. The documents submitted by Canada establish that the  
 26 fugitive has been charged there with the crimes of First Degree Murder and Arson, in violation of the  
 27 Criminal Code of Canada.  
 28



Article 2 of the Extradition Treaty between the United States and Canada (the 1971 Treaty), as replaced by Article I of the 1988 Protocol, defines offenses as extraditable if the “conduct which constitutes an offense” is punished under the laws of both the United States and Canada by a deprivation of liberty for a term exceeding one year or by a more severe penalty. Consequently, the Court should examine the description of criminal conduct provided by Canada in support of its charge and decide whether that conduct would have been criminal under U.S. law if committed in this country. A requesting country is neither obliged to produce evidence on all elements of a criminal offense nor to establish that its crimes are identical to ours. *Kelly v. Griffin*, 241 U.S. 6, 15 (1916).

The Supreme Court noted in *Collins v. Loisel*, 259 U.S. 309 (1922), that dual criminality is not a technical concept involving a comparison of elements of the two countries’ offenses:

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

259 U.S. at 312; *Clarey v. Gregg*, 138 F.3d 764, 765–66 (9th Cir. 1998) (Although simple homicide in Mexico differs from felony murder in the United States, the category of conduct is similar and satisfies the dual criminality requirement.); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988) (crimes not identical, but Hong Kong crimes of false accounting and publishing a false statement are substantially analogous to U.S. crime of making a false entry in a bank statement); *Cucuzzella v. Keliikoa*, 638 F.2d 105, 108 (9th Cir. 1981) (Canadian breach of trust statute analogous to federal embezzlement statutes so dual criminality satisfied).

Dual criminality is established if the conduct involved in the foreign offense would be criminal under either U.S. federal law, the law of the state in which the hearing is held, or the law of

1 a preponderance of the states. *Cucuzzella*, 638 F.2d at 107–08. The court should “approach  
 2 challenges to extradition with a view toward finding the offense within the treaty,” *McElvy*, 523 F.  
 3 Supp. at 48, because extradition treaties should be “interpreted with a view to fulfil our just  
 4 obligations to other powers.” *Grin*, 187 U.S. at 184. Foreign governments should not be expected to  
 5 be versed in our criminal laws and procedures. *Id.* at 184–85.

7 The criminal conduct alleged in Canada falls squarely within conduct prohibited by the  
 8 Federal Criminal Code. Title 18, United States Code, Section 1111, entitled **Murder**, says:

9 (a) Murder is the unlawful killing of a human being with malice aforethought. Every  
 10 murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate,  
 11 malicious, and premeditated killing; or committed in the perpetration of, or attempt to  
 12 perpetuate, any arson . . .; is murder in the first degree.

13 Title 18, United States Code, Section 81 defines **Arson**:

14 Whoever, . . . , willfully and maliciously sets fire to or burns any building, structure  
 15 or vessel, any machinery or building materials or supplies, . . . or attempts or conspires to do  
 16 such an act, shall be imprisoned for not more than 25 years, ...

17 The term “machinery” in Section 81 may include the burning of a motor vehicle, See 2  
 18 Federal Jury Practice and Instructions, § 23:03 (6th ed.) 2015, *United States v. Auginash*, 266 F.3d  
 19 781, 785 (8th Cir. 2001). See also, *United States v. Bedonie*, 913 F.2d 782, 789 (10th Cir. 1990).  
 20 The Request for Extradition set out facts greater than merely sufficient for the Court to conclude that  
 21 Steadman’s conduct, if proven, constitutes felony offenses punishable under the laws of the United  
 22 States.

23 *E. Probable Cause that the Fugitive has Committed the Offenses*

24 The standard of proof to find the evidence “sufficient to sustain the charge . . .” pursuant to  
 25 Section 3184 is the familiar domestic requirement of probable cause. The court must conclude there  
 26 is probable cause to believe that the crimes charged by Canada were committed and the person  
 27 before the court committed them. *Mirchandani v. United States*, 836 F.2d 1223, 1226 (9th Cir.  
 28

1 1988) (probable cause standard applicable in extradition proceeding is whether any evidence exists  
 2 warranting a finding that there was a reasonable ground to believe the accused guilty). The  
 3 evidence is sufficient and probable cause is established if a person of ordinary prudence and caution  
 4 can conscientiously entertain a reasonable belief in the probable guilt of the accused. *Gerstein v.*  
 5 *Pugh*, 420 U.S. 103, 111 (1975). The Supreme Court stated in *Benson v. McMahon*, 127 U.S. 457,  
 6 463 (1888), that:

8 the proceeding before the commissioner is not to be regarded as in the nature of a  
 9 final trial by which the prisoner could be convicted or acquitted of the crime charged  
 10 against him, but rather of the character of those preliminary examinations which take  
 11 place every day in this country before an examining or committing magistrate for the  
 12 purpose of determining whether a case is made out which will justify the holding of  
 13 the accused, either by imprisonment or under bail, to ultimately answer to an  
 indictment, or other proceeding, in which he shall be finally tried upon the charge  
 made against him.

14 *See also Collins*, 259 U.S. 309, 316 ("The function of the committing magistrate is to determine  
 15 whether there is competent evidence to justify holding the accused to await trial, and not to  
 16 determine whether the evidence is sufficient to justify a conviction."); *Fernandez v. Phillips*, 268  
 17 U.S. 311, 312 (1925) ("Competent evidence to establish reasonable grounds is not necessarily  
 18 competent evidence to convict."). *Accord Barapind v. Enomoto*, 400 F.3d 744, 752 (9th Cir. 2005).  
 19 The identification of Steadman by witnesses in Calgary and Edmonton, his DNA on items related to  
 20 the homicide, the pictures of him leaving the victim's burning car within hours of the homicide are  
 21 only a few of the ample facts establishing probable cause to believe that Mr. Steadman committed  
 22 the crimes alleged.  
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### 25 **3. Extradition is *Sui Generis* and Follows Its Own Procedures**

#### 26 **A. An Extradition Hearing Is Not a Criminal Proceeding**

1 The extradition hearing prescribed by Title 18, United States Code § 3184 is unique in  
 2 nature. *See, e.g., Martin*, 993 F.2d at 828; *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976)  
 3 (extradition is *sui generis*). As described in *Jhirad*, an extradition hearing is *sui generis*, meaning its  
 4 own type of case, with its structure and process defined by statute and treaty. *Id.* An extradition  
 5 hearing is not a criminal proceeding; its purpose is to decide the sufficiency of the charge under the  
 6 treaty, not guilt or innocence. *Neely v. Henkel*, 180 U.S. 109, 123 (1901). The limited nature of the  
 7 hearing has resulted in special procedural and evidentiary rules that apply. For example, the person  
 8 whose extradition is sought is not entitled to the rights available in a criminal trial. *Id.* at 122;  
 9 *accord, Charlton v. Kelly*, 229 U.S. 447, 461 (1913); *Martin*, 993 F.2d at 829. The purpose of an  
 10 extradition hearing under § 3184 is not to try the underlying charge; that is for the foreign court.  
 11 *Neely*, 180 U.S. at 123.

12 The Federal Rules of Criminal Procedure do not apply to extradition proceedings. Rule  
 13 1(a)(5)(A) states that the rules do not govern proceedings regarding “the extradition and rendition of  
 14 a fugitive.” The Federal Rules of Evidence are also inapplicable. Rule 1101(d)(3) provides: “The  
 15 rules (other than with respect to privileges) do not apply . . . [to proceedings for] extradition or  
 16 rendition.” *See Melia v. United States*, 667 F.2d 300 (2d Cir. 1981); *Greci v. Birknes*, 527 F.2d 956  
 17 (1st Cir. 1976).

18 The fugitive has no absolute right to discovery. *Messina v. United States*, 728 F.2d 77, 80  
 19 (2d Cir. 1984). “[D]iscovery in an international extradition hearing is limited and lies within the  
 20 discretion of the magistrate.” *In re Extradition of Kraiselburd*, 786 F.2d 1395, 1399 (9th Cir. 1986);  
 21 *cf. Oen Yin-Choy*, 858 F.2d at 1407 (“Although there is no explicit statutory basis for ordering  
 22 discovery in extradition proceedings, the extradition court has the inherent power to order such  
 23 discovery procedures as law and justice require.”).

1 The fugitive's constitutional rights are limited. The fugitive has no right to cross-examine  
 2 witnesses who might testify at the hearing. *Oen Yin-Choy*, 858 F.2d at 1407. There is no Sixth  
 3 Amendment right to a speedy trial. *Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994); *Martin*, 993  
 4 F.2d at 829; *Sabatier v. Dabrowski*, 586 F.2d 866, 869 (1st Cir. 1978). The Fifth Amendment  
 5 guarantee against double jeopardy does not apply to successive extradition proceedings. *Collins*,  
 6 262 U.S. at 429; *In re Extradition of McMullen*, 989 F.2d 603, 612–13 (2d Cir. 1993). Absent  
 7 egregious government misconduct, the Fourth Amendment and the exclusionary rule also are not  
 8 applicable in extradition proceedings. *Magisano v. Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976)  
 9 (argument as to alleged illegalities in wiretapping were not relevant). Finally, the defendant does not  
 10 have the right to confront his accusers. *Bingham v. Bradley*, 241 U.S. 511, 517 (1916).

13 *B. Extradition Hearings Rely on Written Submissions and Do Not Require Live Witnesses*

14 A certification of extradition may be, and typically is, based entirely on the authenticated  
 15 documentary evidence and information provided by the requesting government. *See, e.g., Bovio v.*  
 16 *United States*, 989 F.2d 255, 259-261 (7th Cir. 1993) (Swedish investigator's statement sufficient to  
 17 establish probable cause); *Matter of Extradition of Mainero*, 990 F. Supp. 1208, 1212-1213 (S.D.  
 18 Cal. 1997) (statements of co-conspirators and other witnesses sufficient in extradition to Mexico for  
 19 murder). The finding may also be based upon written statements by the foreign prosecutor or judge  
 20 summarizing the evidence. *Rice v. Ames*, 180 U.S. 371, 375-376 (1901); *accord Glucksman v.*  
 21 *Henkel*, 221 U.S. 508, 513-514 (1911).

24 The federal statute and the applicable treaty govern both the nature of and the admissibility  
 25 of the evidence at an extradition hearing. The treaty applicable in this case, at Articles 9 and 10, list  
 26 the requirements of a submission by Canada and Article 10(2) in the 2001 Protocol requires that the  
 27 documents are "authenticated by an officer of the Department of Justice of Canada and are certified  
 28

1 by the principal diplomatic or consular officer of the United States in Canada.” The Request for  
 2 Extradition was authenticated by such a person Jeffrey G. Johnston, Senior Counsel for the  
 3 International Assistance Group, Department of Justice of Canada, and by Bruce A. Heyman, United  
 4 States Ambassador to Canada, attesting to the authenticity of the foreign official’s signature. Title  
 5 18, United States Code, § 3190 provides that “properly and legally authenticated” documentary  
 6 evidence including “depositions, warrants, or other papers or copies thereof *shall be admitted*.” See  
 7 Title 18, United States Code § 3190 (*emphasis added*)<sup>2</sup>. See *Barapind*, 360 F. 3d at 1069; also  
 8 *Collins*, 259 U.S. at 313 (1922); *Mainero*, 990 F. Supp. at 1212-1213. The documents comply with  
 9 the Treaty requirements.  
 10  
 11

12 Extradition treaties do not require or even anticipate the testimony of live witnesses<sup>3</sup> at the  
 13 hearing because to do so “would defeat the whole object of the treaty.” *Yordi v. Nolte*, 215 U.S. 227,  
 14 231 (1909); see also *Bingham*, 241 U.S. at 517 (1916); *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1163-  
 15 1165 (11th Cir. 2005); *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986); *Shapiro v.*  
 16 *Ferrandina*, 478 F.2d at 902. Hearsay evidence is admissible at extradition hearings and fully  
 17 supports the court’s findings leading to a certification under Section 3184. *Collins*, 259 U.S. at 317;  
 18 *Enami v. U. S. Dist. Court for N. Dist. Cal.*, 834 F.2d 1444, 1450–53 (9th Cir. 1987). In *Bingham*,  
 19 the Supreme Court rejected the respondent’s claim that *ex parte* witness affidavits submitted in  
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23 <sup>2</sup> Depositions, warrants or other papers or copies thereof offered in evidence upon a hearing of any  
 24 extradition case shall be received and admitted as evidence on such hearing for all purposes of such  
 25 hearing if they shall be properly and legally authenticated so as to entitle them to be received for  
 26 similar purposes by the tribunals of the foreign country from which the accused party shall have  
 27 escaped, and the certificate of the principal diplomatic or consular officer of the United States  
 28 resident in such foreign country shall be proof that the same, so offered, are authenticated in the  
 manner required. Title 18, United States Code § 3190.

<sup>3</sup> **Error! Main Document Only.** In fact, no United States extradition treaty, even those most  
 recently negotiated, specifically require live witnesses.

support of his extradition to Canada should not be considered because he had not had the opportunity to cross-examine those witnesses. The Court referred to the applicable treaty language, which obligated the United States to extradite “upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed.” *Bingham*, 241 U.S. at 517. As Title 18, United States Code, § 3190 does today, its predecessor, applicable in *Bingham*, provided for the admissibility at the extradition hearing of depositions, warrants and similar documents upon proper certification by the U.S. diplomatic or consular officer. This principle of extradition law is as firmly-rooted today as it was in 1916 when the Supreme Court decided *Bingham*.<sup>4</sup> See *Zanazanian v. United States*, 729 F.2d 624, 626-627 (9th Cir. 1984) (applying *Bingham* to extradition to Sweden); *Shapiro*, 478 F.2d at 902 (obviating necessity of confronting accused with witnesses against him is “one of the prime objects of bi-lateral extradition agreements”). Even the advent of modern transportation and communication has not changed this firmly-rooted posture of the U.S. courts. See, *Shapiro*, 478 F.2d at 902.

*C. The Fugitive’s Evidence is Quite Limited, as in a Preliminary Hearing*

Due to the nature and limited purpose of an extradition hearing under Section 3184 and the importance of the international obligations of the United States under an extradition treaty, a fugitive’s opportunity to challenge the evidence introduced against him is circumscribed. A fugitive may not introduce evidence that contradicts the evidence submitted on behalf of the requesting country, but may introduce evidence explaining the submitted evidence. “Generally, evidence that

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<sup>4</sup> The principle dates back well into the 19th century. In *In re Heilborn*, 11 F. Cas 1025, 1029 (S.D. N.Y. 1854), the district court ordered extradition based upon a presentation of documentary and other hearsay evidence.



1 explains away or completely obliterates probable cause is the only evidence admissible at an  
 2 extradition hearing, whereas evidence that merely controverts the existence of probable cause, or  
 3 raises a defense, is not admissible.” *Barapind*, 400 F.3d at 749 (quoting *Mainero v. Gregg*, 164 F.3d  
 4 1199, 1207, n.7 (9th Cir. 1999)).

6 The Supreme Court in *Collins*, *supra*, quoted with approval the district court’s reasoning in  
 7 *In re Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883), explaining why the scope of an extradition hearing is  
 8 so limited. In *In re Wadge*, the district court rejected the argument that a fugitive should be given an  
 9 extensive hearing in the extradition proceedings:

11 If this were recognized as the legal right of the accused in extradition proceedings, it  
 12 would give him the option of insisting upon a full hearing and trial of his case here;  
 13 and that might compel the demanding government to produce all its evidence here,  
 14 both direct and rebutting, in order to meet the defense thus gathered from every  
 15 quarter. The result would be that the foreign government though entitled by the terms  
 16 of the treaty to the extradition of the accused for the purpose of a trial where the  
 17 crime was committed, would be compelled to go into a full trial on the merits in a  
 18 foreign country, under all the disadvantages of such a situation, and could not obtain  
 19 extradition until after it had procured a conviction of the accused upon a full and  
 20 substantial trial here. This would be in plain contravention of the intent and meaning  
 21 of the extradition treaties.

19 *Collins*, 316 (quoting *In re Wadge*, 15 F. at 866); accord *Charleton*, 229 U.S. at 461.

20 The extent to which the fugitive may offer explanatory proof is largely within the discretion  
 21 of the committing judicial officer. *Hooker v. Klein*, 573 F.2d 1360, 1369 (9th Cir. 1978). The  
 22 category of explanatory evidence is not large in light of the limited purpose of the hearing, *i.e.*, to  
 23 determine the sufficiency of the evidence to sustain the charge, and in light of the overarching goal  
 24 of the proceeding which is to effectuate the purposes of the treaty. The extradition hearing excludes  
 25 evidence that requires the court to make determinations outside of the scope of the hearing or within  
 26 the province of the ultimate trier of fact, particularly when those determinations rest on foreign law.  
 27  
 28



1 Such evidence exceeds the limits of “explanatory” or “obliterating” evidence and is not properly  
 2 before the court. *In re Extradition of Solis*, 402 F. Supp.2d 1128, 1132 (C.D. CA 2005).

3 In applying the prohibition on considering “contradictory evidence” and the allowance of  
 4 “explanatory evidence,” others courts have followed the explanation of these concepts elucidated by  
 5 the court in *In re the Extradition of Sindona*:

7 The distinction between “contradictory evidence” and “explanatory evidence”  
 8 is difficult to articulate. However, the purpose behind the rule is reasonably  
 9 clear. In admitting “explanatory evidence,” the intention is to afford an  
 10 accused person the opportunity to present reasonably clear-cut proof which  
 11 would be of limited scope and having some reasonable chance of negating a  
 12 showing of probable cause. The scope of this evidence is restricted to what is  
 appropriate to an extradition hearing. The decisions are emphatic that the  
 extraditee cannot be allowed to turn the extradition hearing into a full trial on  
 the merits.

13 450 F.Supp. 672, 685 (S.D. N.Y. 1978), *aff’d sub nom Sindona v. Grant*, 619 F.2d 167 (2d Cir.  
 14 1980).

16 *D. The Fugitive is Not Permitted to Present Technical and Affirmative Defenses*

17 A court should reject defenses against extradition that “savor of technicality” as they are  
 18 peculiarly inappropriate in dealings with a foreign nation. For example, a variance between the  
 19 charges pending in the foreign state and the complaint filed on behalf of that state in our federal  
 20 courts is not a defense to surrender. *Glucksman*, 221 U.S. 508 at 513-514; *accord Bingham*, 241  
 21 U.S. at 517; *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 927-1024 (2d Cir. 1974);  
 22 *Shapiro*, 478 F.2d at 904.

24 It is also well settled that affirmative defenses to the merits of the charge are not to be  
 25 entertained in extradition hearings. *Charlton*, 229 U.S. at 462; *Collins*, 259 U.S. at 316-317;  
 26 *Hooker*, 573 F.2d at 1368. A fugitive may not introduce evidence that (1) merely conflicts with the  
 27 evidence submitted on behalf of the demanding state, *Collins*, 259 U.S. 309 at 315-317; (2) attempts  
 28

1 to establish an alibi, *Shapiro*, 478 F.2d at 901; (3) suggests an insanity defense, *Charlton*, 229 U.S.  
 2 at 462; *Hooker*, 573 F. 2d at 1638 (“the extraditing court properly may exclude evidence of alibi, of  
 3 facts contradicting the government’s proof, or of a defense such as insanity”); or (4) seeks to  
 4 impeach the credibility of the demanding country’s witnesses. *Bovio*, 989 F.2d at 259. These issues,  
 5 which require factual and credibility determinations, are for the court in the requesting country to  
 6 resolve at a trial of the charges.  
 7

8 *E. The Executive Considers Matters Other Than Sufficiency; Rule of Non-Inquiry*  
 9

10 Other than the sufficiency of the evidence, all matters that may be raised by the fugitive as  
 11 defenses to extradition are to be considered by the Secretary of State, not by this Court. See Title 18,  
 12 United States Code, §§ 3184, 3186. In making extradition determinations, “[t]he Secretary exercises  
 13 broad discretion and may properly consider factors affecting both the individual defendant as well as  
 14 foreign relations - factors that may be beyond the scope of the magistrate judge's review.” *Sidali v.*  
 15 *I.N.S.*, 107 F.3d 191, 195 n.7 (3rd Cir. 1997). The Secretary takes into account humanitarian claims  
 16 and applicable statutes, treaties, or policies regarding appropriate treatment in the receiving country.  
 17 See, *Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999). This is consistent with the long-held  
 18 understanding that surrender of a fugitive to a foreign government is “purely a national act . . .  
 19 performed through the Secretary of State,” within the Executive's “powers to conduct foreign  
 20 affairs.” See *In re Kaine*, 55 U.S. 103, 110 (1852).  
 21

22 Therefore, under this constitutionally-based rule of judicial non-inquiry, a fugitive’s  
 23 contention that the extradition request is politically motivated or that the justice system of the  
 24 requesting state is unfair should be addressed by the Secretary of State. It is not the role of the court  
 25 to look behind the extradition request to the motives of the requesting country. *Ordinola v.*  
 26 *Hackman*, 478 F.3d 588, 604 (4th Cir. 2007) (“the motives of the requesting government are  
 27  
 28

irrelevant to our decision” and “must be addressed to the Secretary of State”); *Eain v. Wilkes*, 641 F.2d 504, 513 (7<sup>th</sup> Cir. 1981) (sole discretion of Secretary of State to determine whether foreign country’s request for extradition is a subterfuge). Likewise, the court should not investigate the fairness of the requesting country’s criminal justice system. *United States v. Lui Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) *See also*, *Blaxland v. Commonwealth Director*, 323 F.3d 1198, 1208 (9th Cir. 2003).

Similarly, the Secretary of State has sole discretion under Title 18, United States Code § 3186 and the relevant treaty to determine whether a request for extradition should be denied on humanitarian grounds because of procedures or treatment awaiting the surrendered fugitive. *See Quinn v. Robinson*, 783 F.2d 776, 790-791 (9th Cir. 1986); *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990)(“the degree of risk to [the accused’s] life from extradition is an issue that properly falls within the *exclusive purview* of the executive branch.”)(quoting *Sindona*, 619 F. 2d at 174). Respect for and confidence in the Executive’s exercise of discretion is well placed, as stated in *Ahmad*:

the district court proceeded to take testimony from both expert and fact witnesses and received extensive reports, affidavits, and other documentation concerning Israel’s law enforcement procedures and its treatment of prisoners. This, we think, was improper. The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds. So far as we know, the Secretary never has directed extradition in the face of proof that the extraditee would be subjected to procedures or punishment antipathetic to a federal court’s sense of decency. Indeed, it is difficult to conceive of a situation in which a Secretary of State would do so.

*Ahmad*, 910 F.2d at 1067; accord, *Martin*, 993 F.2d 824 at 830(“humanitarian consideration are matters properly reviewed by the Department of State). Further, a fugitive’s contention that he or she will be tried in the extraditing country for crimes other than those for which extradition will be

1 granted must be rejected as baseless or, if not baseless, as beyond the responsibility of the court, for  
2 the United States government does not presume that the demanding government will seek a trial in  
3 violation of a treaty. *Bingham*, 241 U.S. at 514.  
4

### 5 CONCLUSION

6 Based on the above law and Request for Extradition, the United States requests that the court  
7 conduct a hearing, pursuant to Title 18, United States Code, Section 3184, to determine that the  
8 submission on behalf of Canada is sufficient to sustain each of the charges under the provisions of  
9 the applicable treaty and to certify the extradition of the fugitive for each of those charges to the  
10 Secretary of State for possible surrender to Canada.  
11

12 Dated this 26<sup>th</sup> day of July, 2016.  
13

14 Respectfully submitted,

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17 /s/ Susan M. Roe

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 26, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via e-mail and/or telefax.

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